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Supreme Court of the United States

October Term, 1952

No. 12

FEDERAL POWER COMMISSION, *Petitioner,*

v.

IDAHO POWER COMPANY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR IDAHO POWER COMPANY RESPONDENT

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October, 1952.

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BRIEF FOR IDAHO POWER COMPANY RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 6-13) is reported at 189 F. 2d 665.

JURISDICTION

The original judgment of the Court of Appeals was entered May 10, 1951 (R. 6 and 14). On August 2, 1951 the Chief Justice of the United States by order extended the time for filing petition for writ of certiorari to October 6,

1951 (R. 128). On September 21, 1951, the Court of Appeals clarified and modified its opinion and judgment (R. 16). Petition for certiorari was not filed until December 19, 1951 and certiorari was granted on March 3, 1952 (R. 129).

Respondent contends that the petition for certiorari was neither filed within 90 days of the entry of judgment sought to be reviewed nor within the time for filing as extended by the Chief Justice, and that, accordingly, this Court is without jurisdiction to review this case. 28 USC § 2101(c). This issue is discussed under Point I, *infra*, pp. 16 to 28.

QUESTIONS PRESENTED

1. Whether the petition for certiorari was filed within the time prescribed by 28 U. S. C. § 2101(c) so as to provide this Court with jurisdiction to review on certiorari the opinion and judgment of the Court below.

2. Whether the Court of Appeals, having determined that the conditions attached by the Commission to the inclusion of transmission lines within a previously approved project were illegal and their subject matter "legislative", properly modified the Commission's order by eliminating the invalid conditions and affirming the order as thus modified without remanding the case to the Commission for further deliberation and action.

3. Whether the action of Petitioner in requiring Respondent to agree—as a condition to a license under the Federal Power Act for a hydro-electric project—to permit various agencies of the Department of the Interior to use the transmission lines, constituting a part of such project, for the transmission of Government power in competition with the Respondent, exceeds the authority granted by such Act, is arbitrary and unreasonable, and constitutes a taking of Respondent's property without due process of law.

STATUTES INVOLVED

The jurisdiction of this Court depends upon Title 28 of the United States Code, Sections 452, 1254(1), and particularly Section 2101(e), which provides as follows:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period of not exceeding sixty days."

The only statute granting authority to the Commission to issue licenses for power projects is the Federal Power Act (49 Stat. 847 (1935), 16 U. S. C. 791a *et seq.*) particularly Section 4(e) thereof.

STATEMENT OF FACTS

On August 22, 1947, Respondent filed an application with the Federal Power Commission pursuant to Section 4(e) of the Federal Power Act for a license to construct, operate, and maintain a dam and hydroelectric power project to be known as the "Bliss Development" (R. 26-33). This project, designated by the Commission as "Project No. 1975," was to be erected on the Snake River in the south-central part of the State of Idaho. The original site of this development is shown in the enlarged section of the map attached to the back cover of the Petitioner's Brief, and is marked "August 1947 Plan (Exhibit 'J')." The application filed with the Commission did not describe in detail the proposed transmission lines which would ultimately become necessary to transmit the energy generated at the dam. It merely provided that "The plant will be connected by tap lines to the Company's 138-kv transmission network" (R. 28).[1]

[1] "Tap lines" are not defined in the Federal Power Act or in the Regulations of the Commission. The function of a tap line is

However, the general map of the project area, which was filed with this application as Exhibit "J", showed tap lines connecting the Bliss project with Respondent's Hagerman Valley-Caldwell and Hagerman Valley-Boise lines.

Shortly thereafter, on December 3, 1947, Respondent filed an amendment to the above application which effected a major change in the location of the project (R. 38-43). Such final relocation of the dam and power house is also shown in the enlarged section of the map attached to the back cover of the Petitioner's Brief as the "Nov. 1947 Plan (Exhibit 'K')." As stated in the amendment, this change in the location of the project was prompted by a report of Respondent's geologist which pointed out that the new location would be more satisfactory and provide a better development because of unfavorable geological features of the surrounding terrain at the site first contemplated.[2]

The proposed transmission lines for the project were not located or described in the amendment. Here, as in the original application, the only mention of transmission lines was the statement that "The plant will be connected by tap lines to the Company's 138-kv transmission network" (R. 38). It will also be noted from an examination of the map attached to the cover of Petitioner's Brief that the diagram of the new dam site ("Nov. 1947 Plan"), unlike the diagram of the original project, does not show any transmission lines. It merely shows two short arrows which are conventionally used in such instances, to indicate that there would be transmission lines eventually. Thus, the original application and drawings filed therewith, which showed short tap lines connecting with Respondent's

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to transmit energy from its source of generation to a tap in the integrated transmission system or in the distribution system. The term is not indicative of the length of the line.

[2] Respondent's reason for changing the site of the project does not appear in the printed transcript. It does appear, however, in Vol. 1, p. 36 *et seq.* of the certified record. See Stipulation, R. 133.

existing system, were superseded by an amendment to the application and new maps which clearly show that the location and terminal points of the transmission lines were undetermined.

After the above application and amendment had been filed, the Federal Power Commission, pursuant to Section 4(e) of the Act, notified the Secretary of the Interior concerning Respondent's application and requested a report as to whether or not the proposed project would interfere with any *reservation* under the jurisdiction of this Department (R. 44). On February 19, 1948, the Assistant Secretary of the Interior replied to the Commission's letter and stated that "the Department has no objection to the issuance of a license to the Idaho Power Company for its proposed Bliss Project" provided certain recommendations totally unrelated to the present controversy were followed. (R. 51)[3]

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[3] The "recommendations" referred to in the Assistant Secretary's letter were as follows:

> "(1) That the license be conditioned upon the applicant's starting construction work within one year from the date of issue of the license and upon completing construction of at least the initial generating unit *together with the necessary transmission lines* and appurtenant works within five years of the date of the license.
>
> (2) That, should the applicant determine it is damaged by subsequent upstream diversion of water by the United States in connection with its irrigation and conservation program, then the United States Government has the option, in full settlement of any and all claims by the applicant;
>
> (a) of paying such damages as the applicant shall be then entitled to recover as a matter of law; or
>
> (b) of acquiring the applicant's plant at its depreciated cost."

No mention of "wheeling" or transmission of power for the government was made or even suggested in the Assistant Secretary's letter.

(Emphasis supplied throughout this Brief, unless otherwise indicated.)

After the Commission had received the Department of the Interior's favorable commentary on this project, and after it had received similar reports from various other agencies, it issued, on March 3, 1948, an order authorizing the issuance of a major license for the construction of the project at the site specified in the amended application (R. 51-56). Contained also in this order were the formal findings of the Commission pursuant to Section 10(a) of the Act, that "the project is best adapted to a comprehensive plan for the improvement and utilization of water power development, and for other beneficial public uses . . . " (R. 53). Since neither the amendment to the application nor the new maps filed therewith indicated the location of the transmission lines, which fact was noted in the Commission's order,[4] the Commission reserved the right to determine at a later date what transmission facilities should be included in the license as part of the project (R. 55). However, no reservation was made as to any conditions to be imposed on the use of such lines.

Thus, as of March 3, 1948, Respondent had received authority to construct, operate, and maintain the Bliss Development, including such transmission lines as the Commission should determine later to be a part of the project. Pursuant to the Commission's authorization, Respondent immediately commenced construction of the project.

After the above described project had been authorized, Respondent, on or about July 9, 1948, applied to the Bureau of Land Management of the Department of the Interior for a permit to construct a transmission line over certain public lands (R. 68). The proposed line, which would ultimately be a 230-kv line, would

[4] Paragraph (3) of the Order states: "Although the application states that the powerhouse will be connected by tap lines to applicant's 138-kilovolt transmission network, neither the tap lines nor the switching station from which they emanate are shown to be within the project boundary on the maps submitted as part of the application" (R. 52).

extend generally from Boise to American Falls, Idaho. The Department, in acting on Respondent's application, apparently was influenced by a report entitled "Report on Availability of Power in Southern Idaho for Development of Phosphate Industry" which was prepared by the Bureau of Reclamation and the Bonneville Power Administration and submitted to the Department of the Interior in April of 1948 (R. 112). This report proposed that the United States construct and operate a transmission line which would connect the eastern and western parts of the southern Idaho region. In view of the suggestions contained in this report, the Department of the Interior refused to consider Respondent's application unless it agreed to allow the United States to use these lines for "wheeling" government power. In the belief that the proposed conditions were invalid and would impair the carrying out of Respondent's obligations as a public utility company in the states in which it operates, Respondent declined to subject itself to these conditions. Being unable to obtain the requested permit without the aforesaid conditions, the Respondent, on April 11, 1949, formally withdrew its application from the Department of the Interior.

In the meantime, the Bliss dam was in active construction and approaching completion. It became apparent that final determination must soon be made as to the "primary lines" (Federal Power Act, Section 3(11)) which would emanate from this plant which had been authorized *before* the Department of the Interior had adopted its "wheeling" policy and *before* any application had been made to that Department.[5] After such determination had been made, Re-

[5] The order authorizing the project was issued by the Federal Power Commission on March 3, 1948 (R. 56). The so-called "wheeling" policy of the Department of the Interior was contained in its regulations first promulgated on October 14, 1948, 13 Fed. Reg. 6214, and was amended on July 18, 1949, 14 Fed. Reg. 4620. Application for permit was made by Respondent to the Bureau of Land Management of the Department of the Interior on or about July 9, 1948 (R. 68).

spondent, on April 20, 1949, filed an "Application for Supplementary Amendments to Application for License" with the Federal Power Commission (R. 58-63). In this application, Respondent proposed to construct primary lines from the Bliss plant to Boise and American Falls, Idaho.

These were unquestionably "project" lines under the Act, and the Commission itself so recognized and adjudged them when it included them in the license as a part of the project facilities,—thus also approving the Company's plans for the transmission of Bliss power from the power plant. The necessity of additional transmission lines to carry the power from the plant (instead of merely "tapping" it into the Company's existing transmission system) is apparent from the size of the Bliss power plant, and the transmission capacity required to carry the Bliss power output to the Boise and American Falls load centers (R. 85).

Notwithstanding the statements in Petitioner's Brief to the contrary (pp. 5 and 6), Respondent's proposed project lines did not require any alterations or changes in the then specifications or plans of the project. The project, as authorized by the Commission did not purport to describe any transmission lines.[6] As shown by the record, the question of the location of the lines was, as of that time, undetermined.

After Respondent had filed its supplementary amendments setting forth the proposed primary lines, the Federal Power Commission again wrote to the Department of the Interior, pursuant to Section 4(e) of the Federal Power

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[6] Petitioner, in attempting to show that Respondent, in effect, changed the scheme of the project because of the Department of the Interior's refusal to grant it a permit, states that the original tap lines were only six miles long and connected with certain specified transmission lines (Pet. Br. p. 5). Petitioner glosses over the fact that the location of these short tap lines as well as the location of the dam itself were completely changed by Respondent in 1947—before the project was authorized and before the Department of the Interior had adopted its "wheeling" policy.

Act, to determine whether or not the inclusion of the transmission lines would interfere with any *reservation* under the supervision of the Department (R. 66-67). Secretary Krug, in response to this letter, requested that the Commission order Respondent to show cause why its application for the inclusion of transmission lines as part of the project should not be dismissed (R. 72), on the principal grounds that Respondent's proposed lines were not primary lines as defined by Section 3(11) of the Federal Power Act, and therefore not within the jurisdiction of the Commission (R. 71).[7]

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[7] Petitioner, in footnote 3, page 7 of its Brief, states that the Secretary of the Interior has not abandoned the position that Respondent's transmission lines are not project lines and that such lines are not under the jurisdiction of the Commission. However, this controversy has actually been resolved for the purposes of this case, at least. On October 13, 1949, the Secretary of the Interior filed a formal complaint in this matter (R. 111) praying that Respondent's application for inclusion of the transmission lines as part of the project be dismissed on the grounds, *inter alia*, that the proposed lines were not project lines. On the same day the Commission issued an order, in which it found Respondent's proposed lines to be project lines as defined by Section 3(11) of the Federal Power Act (R. 103), and authorized the inclusion of the transmission lines as part of the project. Shortly thereafter, Respondent filed a Petition for Rehearing in which it requested that the "wheeling" provisions, inserted in the 1949 order, be eliminated (R. 116-119). The Commission, in an order dated January 18, 1950, modified its earlier order *and dismissed the complaint of the Secretary of the Interior* (R. 128). The Secretary of the Interior did not seek a rehearing or review of the order dismissing his complaint, nor did he seek a rehearing of the Commission's order finding that the proposed lines were project lines. Section 313(a) of the Federal Power Act and Section 1.34 of the Commission's Rules of Practice and Procedure provide that petitions for rehearing must be filed within 30 days after issuance of the order. Section 313(b) of the Federal Power Act provides for review of Commission orders upon the filing of a petition for review within 60 days of the final order. The Secretary of the Interior, however, took no such formal steps to preserve whatever rights, if any, he may have had (see *United States, ex rel. Chapman* v. *Federal Power Commission*, 191 F. 2d 796 (4th Cir. 1951), cert. granted 343 U. S. 941).

The Respondent, however, after being apprised of the Secretary's letter, wrote a lengthy letter to the Commission fully rebutting the objections of the Secretary (R. 82-91).[8] The latter, in turn, proposed to the Commission certain "wheeling" conditions which he requested to be incorporated into the license in the event that the Commission should decide to issue the license for the project lines (R. 94-95).

Based on findings that neither line alone is capable of transmitting the entire power output of the Bliss plant, and that both lines must be used as "primary lines" comprising a necessary part of the "project" (R. 101), the Commission, on October 13, 1949, issued an order, *effective as of March 1, 1948*, authorizing the inclusion of such lines as part of the project (R. 104). This authorization, however, was subject to the conditions complained of below, and specifically states that these conditions were inserted therein at the request of the Secretary of the Interior (R. 101). These conditions, appearing under paragraph (F) of the Order (R. 107-110), require:

> (1) Upon request of the Secretary of the Interior, Respondent shall, after notice of at least one year,

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[8] For example, the inference in paragraph 4 of the Secretary's letter that Respondent had no intention of constructing the Boise-American Falls line until it discovered that the government intended to build a similar line (R. 69) is without basis in fact. (R. 83-84). In response to the Secretary's statements that Respondent was a trespasser on government lands (because it had started construction of its proposed lines pursuant to a "pre-license permit" issued by the Commission) and that the Department of the Interior had obtained from the United States District Court for the District of Idaho, a temporary restraining order against Respondent restraining such trespass (R. 72), Respondent showed that the Secretary's accusations had no basis in law or fact and that his motion for an injunction had ultimately been denied by the Idaho District Court (R. 91). *United States* v. *Idaho Power Co.*, 85 F. Supp. 913 (D. Idaho), appeal dismissed (9th Cir. Feb. 13, 1950).

convert the project lines from operation at 138 kilovolts to operation at 230 kilovolts at the expense of the United States;

(2) After the lines have been constructed or converted to the higher voltage, Respondent shall permit the United States to interconnect any of its transmission facilities with said lines, provided there is capacity available in said lines in excess of Respondent's needs;

(3) Upon the completion of such interconnections, the United States shall have the right to transfer such amounts of energy over said lines as will "*not unreasonably interfere*" with Respondent's own use of the lines;

(4) If Respondent's capacity needs are such that it requires all or a part of the capacity then being used by the United States, it may revoke the agreement to carry federal power upon giving 30 months' notice.[9]

The order also contains other less important provisions concerning the "wheeling" of government power.

It should be noted that the government, under these conditions, would have authority to use Respondent's lines to the extent that such usage will *not unreasonably interfere with Respondent's use.* Provision F(2) of the Commission's order states that the government can interconnect with Respondent's line "provided there is capacity in said line or lines in excess of the needs of the licensee" (R. 107). However, provision F(3) states that once such interconnection is made, the United States will have the right

[9] It would appear that Respondent will not be sole judge as to when it will require additional capacity, and that the giving of a 30-month notice will not automatically oust the government from the lines, but will only constitute notice for a hearing to be had on the question. Such is the Secretary of the Interior's construction of this proviso (R. 120).

to transmit energy "in such amounts as will not unreasonably interfere with licensee's use of said lines" (R. 107). *The measure of government use is not, as Petitioner states on pages 2, 3, 9 and 10 of its Brief, measured by the "excess capacity" of Respondent's lines,* but rather it is measured by such use as will *"not unreasonably interfere"* with Respondent's operations. There is a wide and critically important difference in purport between the expressions "unused capacity" and "unreasonably interfere." The latter is indefinable on any practicable operating basis.

On the same day that the Commission authorized the inclusion of transmission lines as part of the project, the Secretary of the Interior filed a formal complaint in this matter praying that Respondent's application be dismissed (R. 111-115).[10] Shortly thereafter, Respondent filed with the Commission a Petition for Rehearing requesting *inter alia,* that the "wheeling" provisions be stricken from the order (R. 116-119). On January 18, 1950, the Commission issued a modifying order whereby the notice period for recovering full capacity of the project lines was reduced from 30 months to 24 months (in itself a recognition of the importance in public utility operation of the time element involved). In this order, the Commission also denied Respondent's petition for rehearing and dismissed the formal complaint of the Secretary of the Interior (R. 127).

On February 7, 1950, Respondent filed with the Court of Appeals for the District of Columbia Circuit a Petition for Review pursuant to Section 313(b) of the Federal Power Act and Section 10 of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009. The Court of Appeals held that the Federal Power Commission was without statutory authority to prescribe the "wheeling" conditions contained in paragraph (F) of its order and that the order must be modified accordingly, *Idaho Power Co. v. Federal Power Commission,* 189 F. 2d 665 (1951). This Court granted certiorari on March 3, 1952 (R. 129).

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[10] See footnote 7.

SUMMARY OF ARGUMENT

Petitioner did not file with this Court a petition for certiorari within the time prescribed by law. Although Petitioner after judgment, filed in the Court of Appeals, a "Motion for Clarification of Judgment", and that court acted on this motion, an examination of its form and content indicates that it requested only a formal change in the judgment. Accordingly, since it did not seek to alter the rights adjudicated or affect the substance of the case, it did not suspend the finality of the judgment. Thus, upon expiration of the time as extended by the Chief Justice of this Court on October 6, 1951, the time in which to petition for certiorari had expired.

However, even if Petitioner's motion did affect the substantive rights adjudicated, it would operate to extend the time for filing a petition for certiorari only if it were timely. Petitioner's motion was filed sixty-seven days after entry of judgment—long after the time limitation set for such motions by the Rules of the Court of Appeals. The precedents of this Court are clear that, except in bankruptcy matters, an untimely motion after judgment does not affect the time for appeal even if it purports to affect the substance of the case. This is true in the Court of Appeals as well as in the District Court since the rules of both courts limiting the time within which a judgment can be reconsidered have the effect of law. If the rule were otherwise, a litigant could, as Petitioner now attempts, control and extend indefinitely the time for filing a petition for certiorari.

The court below properly eliminated the invalid conditions without remand to the Commission. The Commission's 1948 order was founded on all necessary statutory prerequisites and authorized the license for the project as a whole (other than transmission lines) entirely independent of the invalid conditions not then before the Commission. The invalid conditions, attached in 1949, with respect to

the inclusion of transmission lines within the project, were properly found by the Court to relate to a separate and distinct subject matter: required interconnection of public and private transmission facilities and compulsory transmission of public power by private companies. Conditions dealing with this subject matter were properly found by the Court to be not only unauthorized, but actually prohibited by the Act and to be of *legislative* rather than administrative concern. Accordingly, the invalid conditions were necessarily separate and distinct not only from the order authorizing the projects as a whole, but also from the determination of "what" transmission lines" were includible in the project. With the invalid conditions eliminated, the Commission's order was then complete in its conformance to statutory requirements and further consideration of the "legislative problem" to which the conditions related would have been manifestly improper.

Petitioner's brief on the merits is based on a mistaken application of the doctrine that the United States, in its sovereign capacity as the owner of the public lands, can condition permission to use such lands as it sees fit. Nowhere in this proceeding has Respondent questioned the authority of the *United States* to impose conditions or restrictions upon the use of its lands, or to appropriately delegate such authority.

The essence of the Respondent's case is that the Federal Power Commission has not had conferred upon it the authority to impose the conditions herein complained of; on the contrary, Congress has made its intent clear to withhold such power from the Petitioner.

The legislative history of the Petitioner's organic statute reveals that Congress considered, in 1919 (as to the original Federal Water Power Act, now Part I), and in 1935 (as to "this Act" as a whole) proposals to require subject companies to serve as common carriers, and that such proposals were rejected. Congress also considered the question of electric public service companies being required under the

Act to carry power generated by federal and municipal plants, and added a new subsection in 1935 to make clear that such was not the legislative intent.

The Federal Power Act is a single unit composed of three interrelated parts. The contention that the Act can be treated as separate units, each standing alone as if the other parts had never been enacted, is rebutted by the history of the Federal Power Act, the method of its enactment and the manifest interrelation of its parts.

No other statute lends support to Petitioner's unauthorized action. The powers of the Department of the Interior are limited in this matter solely to the protection and utilization of any reservation under its control. Petitioner has not seriously argued that this limited interest of that Department in any way provides the necessary authority for these conditions.

The authority which the Commission seeks to invoke has never been exercised in its thirty years of existence. Petitioner's assertion that it never had need for such conditions in the past is rebutted by the fact that public power has been a major governmental function for well over a decade. The Commission is, in effect, legislating in a field which has been knowingly and specifically withheld from its jurisdiction. The effect of this legislative action is to impose upon Respondent conditions which are totally arbitrary and unreasonable and constitute a seizure of its property without authorization of Congress.

In essence, Petitioner's problem is inherently legislative. "If the Commission believes it to be in the public interest to prescribe such a condition upon power project licenses, it should present its views to the Congress" (R. 13).

ARGUMENT

I

This Court Does Not Have Jurisdiction to Review This Case Because the Petition for Writ of Certiorari Was Not Filed Within the Prescribed Time.

Certiorari was granted to Petitioner in this case under Section 313(b) of the Federal Power Act (16 USC § 825l) and 28 USC § 1254(1). It is provided in 28 USC § 2101(c) that petitions for writs of certiorari must be applied for within ninety days after entry of the judgment or decree sought to be reviewed, unless extended by this Court for a period of not exceeding sixty days. If the petition is not filed within the prescribed time, the Court does not have jurisdiction to entertain it. *Hope Basket Company* v. *Product Advancement Corp.*, 324 U. S. 833 (1951); *Department of Banking* v. *Pink*, 317 U. S. 264 (1942).

Respondent respectfully submits that Petitioner did not file its petition for a writ of certiorari within the time prescribed by law and that this Court is without jurisdiction to entertain this case.[11]

The opinion and judgment of the Court of Appeals were filed and entered on May 10, 1951 (R. 6 and 14). Sixty-seven days thereafter, on July 16, 1951, the Commission filed a "Motion for Clarification of Judgment" (R. 15), and *subsequently* made a timely application to this Court for an extension of time within which to file a petition for certiorari. This application was granted, and the time for such filing was extended to October 6, 1951 (R. 128). No further extension of time to apply for certiorari was, or could have been, granted under 28 USC § 2101(c). On September 21, 1951, fifteen days *before* the expiration of the

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[11] *Forsyth* v. *City of Hammond*, 166 U. S. 506, 511 (1897): "It may be that the question of propriety should be considered as foreclosed by the action of the Court in awarding the writ of certiorari, but *the question of power, being one of jurisdiction, is always open, and must whenever presented be considered and determined.*"

extended period for filing certiorari, the Court of Appeals clarified its judgment of May 10, 1951 (R. 16). However, the Petitioner did not file its petition for certiorari within the period as extended by the Chief Justice of this Court. The Petition was not filed until December 19, 1951, 74 days after the expiration of the extended period, and 232 days after the entry of judgment.

Petitioner contends (in its Reply Brief on certiorari, pp. 1 and 2) that the time for filing its petition for certiorari was tolled by the filing of the "Motion for Clarification" and that the ninety-day period did not start to run until after the Court of Appeals entered its "clarifying" order on September 21, 1951. We submit that the Motion for Clarification and the action of the Court of Appeals thereon did not suspend the period during which the Petitioner was obligated to file its petition. Since the petition was not filed within the period as extended by this Court, it was untimely and of no avail.

A. A motion for mere formal changes in judgment does not toll the time for appeal.

A timely petition for rehearing tolls the running of a statutory limitation and the time to seek review, since it operates to deprive a judgment of the finality which is essential to appealability. *Denholm & McKay Co.* v. *Commission of Internal Revenue*, 132 F. 2d 243, 247 (1st Cir. 1942). But this doctrine is applicable only where such petitions seek a "reconsideration of * * * basic findings * * * and the alteration of the conclusions of the Court," so that, if granted, "rights already adjudicated [will] be altered." *Leishman* v. *Associated Wholesale Electric Company*, 318 U. S. 203, 205 (1943); cf. *Zimmern* v. *United States*, 298 U. S. 167 (1936). Thus, it is well established that the reentry of a final judgment with only formal changes not affecting any matter adjudicated does not enlarge the time to seek review. *Department of Banking* v. *Pink*, 317 U. S. 264 (1942).

Petitioner's Motion for Clarification was filed on July 16, 1951, sixty-seven days after entry of the opinion and

judgment and *fifty-two days after expiration of the time for filing a Petition for Rehearing*, nor was such time "enlarged by the court or a judge thereof" (Rule 26(a) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit).[12] Enlargement of the 15-day period within which to file Petitions for Rehearing can only be granted, *after* the expiration of such period, "for cause shown * * * where the failure to act was the result of excusable neglect," Rule 32(b), *ibid.*[13] Petitioner's

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[12] The text of this rule provides:

Rule 26—Rehearing

"(a) *Petition.* A petition for rehearing may be filed with the Clerk, when accompanied by proof of service on the adverse party, within fifteen days after judgment or decision, unless the time is shortened or enlarged by the court or a judge thereof. Such petition must be printed and signed and forty copies thereof furnished. It must briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. A petition for rehearing is not subject to oral argument, unless ordered by the court."

[13] The full text of Rule 32 is as follows:

"(a) *Computation.* The computation of any period of time specified by these rules shall be governed by Rule 6(a) of the Federal Rules of Civil Procedure.

(b) *Enlargement.* When by these rules or by order of this court an act is required or allowed to be done at or within a specified time, the court or a justice thereof for cause shown may (except where the time is also fixed by statute), at any time in the discretion of the court or a justice thereof, (1) upon motion order the period enlarged if application thereof is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect.

(c) *Reducing time periods.* The court on motion or *sua sponte* may by order in any cause reduce the time period fixed by the rules of this court for doing any act, whenever it appears in the interests of justice to do so."

Motion did not set forth any "cause" for late filing, and since the Court's order of September 21, 1951 is similarly devoid of any finding of "excusable neglect," it is apparent that neither the Court nor Petitioner considered the Motion to be a petition for rehearing authorized by Rule 26(a).[14] Cf. *United States* v. *Seminole Nation*, 299 U. S. 417, 420-421, (1937).

Moreover the Motion did not request reargument or reconsideration by the Court of any substantive issue previously adjudicated. No error in the Court's conclusions of law was alleged, and no modification of any such conclusion was proposed, (R. 16). The Court was merely asked for advice or to restate in different words what it had already decided. Here, as in *Department of Banking* v. *Pink*, 317 U. S. 264, 266:

> "* * * the motion did not seek a reargument or rehearing of any part of the case; *it was no more than a request that the Court of Appeals declare what had in fact occurred upon its previous decision of the case.* * * *
>
> "* * * Unlike a motion for reargument or rehearing, it did not seek to have the Court of Appeals reconsider any question decided in the case. The final judgment already rendered was not challenged; * * *.
>
> "* * * Here no such alteration of the rights adjudicated was asked, and the finality of the court's first order was never suspended."

Petitioner, initially at least, must have shared our contention that the Motion did not purport to affect the substance of the case, since subsequent to the filing of that Motion it applied to this Court for an extension of time in which to file a petition for certiorari.* *This action would obviously have been unnecessary if Petitioner considered*

[14] Petitioner's failure to file in the Court of Appeals forty printed copies of its Motion for Clarification and "a certificate of counsel to the effect that it is presented in good faith and not for delay," as required by Rule 26(a), constitutes further evidence that it did not consider such Motion a Petition for Rehearing.

this Motion as one tolling the time for filing its petition for Certiorari.

Petitioner, however, *now* contends (Pet. Reply Br. on certiorari, p. 3) that the *effect* of the order issued pursuant to its Motion actually altered the substance of the judgment. It is asserted that under the original judgment, the Commission apparently had power on remand to reconsider Respondent's application for a license, whereas under the clarified judgment, the Commission was precluded from such reconsideration. This assertion is completely groundless.

The judgment of the Court of Appeals, filed on May 10, 1951, reads as follows (R. 14):

> "On consideration whereof, It is ordered, adjudged and decreed by this Court that the order of the said Federal Power Commission on review in this cause be modified, and that this cause be, and it is hereby, remanded to the Federal Power Commission for the entry of an order *in accordance with the opinion of this Court.*"

If there were any ambiguity in the judgment itself, it was dispelled by the incorporation of the undeniably clear directives of the opinion. "A direction for proceedings in accordance with 'the opinion' makes it part of the mandate," *Rogers* v. *Hill*, 289 U. S. 582, 587 (1933). See also *Gulf Refining Co. v. United States*, 269 U. S. 125, 136 (1925).

The case was remanded only for the ministerial act of entering an order. Nowhere is there an indication that the Commission will have any function other than ministerial. Further proceedings were not directed; the taking of additional evidence was not prescribed; a reconsideration was not to be had.

It follows, therefore, that the Court's purely formal action in rewording the language of a portion of its opinion and judgment did not operate to enlarge the time for filing a petition for certiorari in the instant case.

B. Even if the motion is construed as a motion affecting the substance of the judgment, it was untimely and therefore did not toll the time for appeal.

Even if the Motion were a "motion for reargument or rehearing," seeking "an alteration of the *rights* adjudicated,"[15] such motion, as we have pointed out above, was untimely under the Court of Appeals' Rule 16. Unlike a *timely* petition for rehearing, the filing of an untimely petition for rehearing does not enlarge the time for appeal, *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498 (1927) and *Morse* v. *United States*, 270 U. S. 151, 154 (1926), where this Court said:

> "The suspension of the running of the period limited for the allowance of an appeal, after a judgment has been entered, *depends upon the due and seasonable filing of* the motion for a new trial or *the the petition for rehearing.*"

To rebut this contention of Respondent, Petitioner, in its Reply Brief on certiorari, page 2, cited the cases of *Bowman* v. *Loperena*, 311 U. S. 262 (1940), and *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144 (1942), holding that if an untimely petition for a rehearing is "entertained" on the merits, the time for appeal is suspended. However, both of these cases involve questions of bankruptcy and the novel characteristics of the Court of Bankruptcy. That Court, by the nature of its functions, must maintain continued control over the debtor and be free to modify its actions as circumstances change, as the Notes of Advisory Committee on Rules show (Annotations to Rule 73 of the Federal Rules of Civil Procedure appearing in 28 U.S.C.A., p. 430):

> "In bankruptcy proceedings it is established that as the bankruptcy court has no terms it has the power *at any time* for good reason to revise its judgments or

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[15] *Department of Banking* v. *Pink*, 317 U. S. 264, 266 *supra*, p. 19.

orders upon seasonable application and before rights have vested on the faith of its action. A motion so to do may be entertained *even after the expiration of time for appeal,* and such appeal time will start running anew upon the disposition of the motion. Wayne United Gas Co. v. Owens-Illinois Glass Co., 1937, 57 S. Ct. 382, 300 U. S. 131, 81 L. Ed. 557; Bowman v. Loperena, 1940, 61 S. Ct. 201, 311 U. S. 262, 85 L. Ed. 177; Pfister v. Northern Illinois Finance Corp., 1942, 63 S. Ct. 133, 317 U. S. 144, 87 L. Ed. 146; Chapman v. Federal Land Bank, C.C.A. 6, 1941, 177 F. 2d 321; State of Missouri v. Todd, C.C.A. 8, 1941, 122 F. 2d 804. In *ordinary civil actions* governed by the Federal Rules of Civil Procedure, however, the *better view is that when the time limits prescribed in the rules expire, the court loses its jurisdiction* to entertain a motion, as for new trial or for a rehearing or to vacate or amend, as the case may be, *and cannot thereafter entertain such a motion* and thereby start the appeal time running anew. Safeway Stores, Inc. v. Coe, App. D. C. 1943, 136 F. 2d 771; Jusino v. Morales & Tio, C.C.A. 1, 1944, 139 F. 2d 946; Nealon v. Hill, C.C.A. 9, 1945, 149 F. 2d 883; Norris v. Camp, C.C.A. 10, 1944, 144 F. 2d 1. It has been said that *the bankruptcy rule,* stated supra, *is to be distinguished as based on the distinctive nature of bankruptcy proceedings; and that since the Federal Rules have abolished terms and substituted therefor various definite time limits,* the same rule should be applied when such time limits expire as was applied formerly when terms were effective. Safeway Stores, Inc. v. Coe, supra. See also discussion of these distinctions in Oglebay, Some Developments in Bankruptcy Law, 1946, 20 J. of Nat'l Ass'n of Ref. 76, 80."

The rationale of the holdings in the cases referred to above in the Advisory Committee's notes as expressing "the better view" is well set forth in the opinion of the Court of Appeals for the District of Columbia Circuit in *Safeway Stores, Inc.* v. *Coe,* 136 F. 2d 771 (D. C. Cir. 1943), where the court said at page 775:

"Rule 6(c) now abolishes the effect of the expiration of the term on the power of the court to act, Rule

59(b) provides a definite time within which a motion for new trial may be made, and Rule 6(b) forbids the Court to enlarge that time. *If it were not thereby intended to make the running of that definite time as conclusive on the power of the Court as was formerly the expiration of the term, there would be no limit on the power of the Court to act and no finality when it did act.* A construction which would empower the Court to hear motions long out of time would destroy the rule for by the very act of hearing, prohibited extensions could effectively be granted."[16]

The Seventh Circuit, since the publication of the Advisory Committee's notes, has also adopted the limitation proposed in the *Safeway* case. In *Fine* v. *Paramount Pictures*, 181 F. 2d 300 (7th Cir. 1950), the court said at page 304:

> "A trial court by assuming to hear and determine a belated motion for a new trial cannot thereby affect the finality of the judgment or enlarge the time for taking an appeal. *Safeway Stores* v. *Coe*, 78 U. S. App. D. C. 19, 136 F. 2d 771, 184 A.L.R. 182."

Further, since that time, the Ninth Circuit has strictly applied the same principle with respect to the substantially identical provisions of Rule 47 of the Federal Rules of Criminal Procedure. *Marion* v. *United States*, 171 F. 2d 185, 186 (1949), *cert. denied*, 337 U. S. 944, which held as to a motion for new trial, made more than five days after verdict, that: "The motion having been filed too late the court was without jurisdiction to entertain it."

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[16] *Nealon* v. *Hill*, 149 F. 2d 883 (9th Cir. 1945), cert. denied 326 U. S. 753, also referred to in the Advisory Committee's notes specifically held at p. 885:

> "Not having been seasonably filed, the petition did not enlarge or extend the time for appeal. *Morse* v. *United States*, 270 U. S. 151, 46 S. Ct. 241, 70 L. Ed. 518. This is a civil action and not a petition in a bankruptcy proceeding, and therefore *Wayne United Gas Company* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557, and *Bowman* v. *Loperena*, 311 U. S. 262, 61 S. Ct. 201, 85 L. Ed. 177, relied upon by appellant *are not in point.*"

It should be noted in this respect that the term of court doctrine limiting motions after judgment has been abrogated in the Court of Appeals as well as in the District Court. 28 USC § 452. Consequently, if, as the above cases hold, there is need for a definite limitation on motions after judgment in the District Court, there is an equivalent need for such a limitation in the Court of Appeals. If in the District Court strict compliance with Federal Rule 59(b) is required (limiting motions after judgment to 10 days after entry), so also in the Court of Appeals the same reasoning compels strict compliance with the rules of that court governing motions after judgment there.

This concept is reflected in the present language of Rule 32(b) of the Rules of the Court of Appeals for the District of Columbia Circuit, which is substantially identical with Rule 6(b) of the Federal Rules of Civil Procedure.[17] It provides that the Court may permit an act to be done after the expiration of a specified period, *only* upon a motion showing that "the failure to act was the result of excusable neglect." No such showing was made by Petitioner as to why it filed its Motion for Clarification 67 days after judgment, instead of within the 15 days prescribed by Rule 26(a), the *only* rule of the Court of Appeals authorizing motions after judgment. We therefore submit that the Court of Appeals could *not, as a matter of law,* have treated the Motion for Clarification as a Petition for a Rehearing, or one for any kind of relief that would toll the running of the time for taking an appeal, because the Rules

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[17] One very important difference does exist between the two rules. Court of Appeals Rule 32(b), in contrast to Rule 6(b) and Rule 73(a), would permit a proper showing of "excusable neglect" to extend the time for taking an appeal from that Court. This extension of the concept of "excusable neglect" provides even a greater safeguard against harsh results than the 1948 Amendments to the Federal Rules (see *Hill v. Hawes*, 320 U. S. 520 (1944) and the annotations to Rule 73 of the Federal Rules of Civil Procedure, 28 USCA at p. 429, relating thereto).

of that Court "have the force and effect of law" and are as binding on the Court as on any litigant, *Bradley* v. *Pace*, 183 F. 2d 806, 807-808 (D.C. Cir. 1950).

Any other construction would leave the finality of judgments forever uncertain. Such a result applied to non-bankrupty cases, where the litigants have no continuing relationship to the court, is palpably unjust, as was clearly recognized by this Court in *Matton Steamboat Co.* v. *Murphy*, 319 U. S. 412, 415 (1943):

> "The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within the time prescribed application has been made; and if it has not, *to advise prospective appellees that they are freed of the appellants' demands.* Any other construction of the statute would defeat its purpose."

We therefore submit that the rationale of the *Safeway* case opinion and the other Court of Appeals decisions cited above, of strict compliance with definite limitations after judgment, should be applied in *non-bankruptcy* cases emanating from the Courts of Appeal.

C. Petitioner has not sustained the burden of showing affirmatively that this Court has jurisdiction.

Even under Petitioner's theory of the jurisdictional issue, that the *Loperena* and *Pfister* cases are applicable here, petitioner still must show that its untimely motion was entertained on the merits. The only way, of course, to determine whether or not petitioner's motion was so entertained is to examine the order issued pursuant to the motion. "Whether the time for appeal would be enlarged or not would depend on what the order showed the court did.", *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, *supra*, page 151.

> "[If the] * * * court merely considers whether the petition sets out, and the facts if any are offered sup-

port, grounds for opening the original order and determines that *no grounds for a reexamination of* the *original order are shown*, the hearing upon or examination of the grounds for allowing a rehearing *does not enlarge the time for review* of the original order * * * " (*ibid.*, p. 150).

Here the Court of Appeals, without opinion, merely amended the opinion and judgment as of *May 10, 1951* (R. 18). Like the original, the amended judgment bears the Clerk of the Court's stamp "Filed May 10, 1951", entirely contrary to its normal practice in disposing of Petitions for Rehearing, to enter an entirely new opinion and judgment where modifications of substance have been ordered upon a reconsideration of the merits. See *Mayflower Hotel Stockholders Protective Committee* v. *The Mayflower Hotel Corporation*, 193 F. 2d 666 (D. C. Cir. 1951), where the court, presented with a matter of substance on a Motion for Clarification, dismissed the motion and, *sua sponte*, ordered a rehearing on the merits.

Further, there is nothing in the record to indicate that the Court of Appeals ever reconsidered, as a proposition of law, its power to modify, and affirm as modified, Petitioner's original order. It therefore appears that the court below "determine[d] that no grounds for reexamination of the original order [were] shown," *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, at 150, and that Petitioner's Motion for Clarification, if it sought a readjudication on the merits, was never "entertained". Thus, Petitioner has not sustained the burden of showing "affirmatively" that this Court has jurisdiction, *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 651 (1942) and *Lynch* v. *People of New York ex rel. Pierson*, 293 U. S. 52 (1934).

Nor can the Petitioner claim that dismissal of the writ of certiorari, under the circumstances of this case, would be a harsh result. Petitioner and its counsel must have been aware of the risks involved even in its own theory of this jurisdictional issue. As this Court pointed out in

Wayne United Gas Co. v. *Owens Co.*, 300 U.S. 131, 137 (1937), *supra*, p. 23, also a bankruptcy case:

> "A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, *takes the risk that he may lose his right of appeal*, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal."

Prudence would seem to have dictated the preparation of at least a draft petition for certiorari and brief at some time during the 67 days (see *Commissioner of Internal Revenue* v. *Bedford's Estate*, 325 U.S. 283, 288 (1945)) the Court of Appeals had the motion for clarification under consideration.[18] Even if that precaution were not taken, Petitioner still had 15 days after the entry of the Court of Appeals clarifying order on September 21, to file a petition for certiorari before the termination of the statutory period, as extended by the order of the Chief Justice, on October 6, 1951. Hence, Petitioner was not in the unfortunate situation of the appellants in *Klein's Outlet* v. *Lipton*, 181 F. 2d 713 (2d Cir. 1950) cert. denied, 340 U.S. 833 (1950), where a motion for reargument was still under advisement by the District Court when the time for appeal under the Bankruptcy Act expired. However, even if we should apply here a hypothetical relaxation of "the rule of the *Wayne* case to the extent of deducting from the time elapsing between the entry of a judgment and the taking of an appeal the period during which the court holds under advisement the motion for reargument," *Klein's Outlet* v. *Lipton*, at p. 714, it would not save the present petition for certiorari. Deducting the 67 days the Court of Appeals held the motion for clarification under advisement from the total of 232 days between the date of the original judgment, May 10, and the date when the Petition for Certiorari was actually filed, December 19, 1951, Petitioner would still be 165 days late. Or to take another hypothetical assumption, deduct-

[18] Cf. *Petition of Schuette*, 178 F. 2d 920 (2d Cir. 1949).

ing the 67 days the motion for clarification was under advisement from the period of the extended date for filing the petition for certiorari, October 6, to the actual filing date of December 19, 1951, Petitioner would have been 7 days late. As the 2d Circuit held in the *Klein's Outlet* case, 181 F. 2d at p. 715, "Under either view the appeal was untimely. Accordingly it must be dismissed."

For the foregoing reasons it is respectfully prayed that this court dismiss the writ of certiorari for lack of jurisdiction.

II.

The Modification of the Order of the Federal Power Commission Without Remand Was Entirely Appropriate

Petitioner contends that an exercise of the Commission's judgment is required by statute (Pet. Br. 18-21); that this judgment cannot be exercised by the reviewing court (Pet. Br. 21-27); and that a remand is required unless the agency clearly manifests its intention to permit the modified order to stand (Pet. Br. 27-31).

Respondent does not disagree with these principles and it is apparent that the Court of Appeals for the District of Columbia Circuit correctly applied them to the facts of this case.

This case is not one in which the administrative order is based on no findings at all[19] or in which Respondent has failed to utilize or exhaust its administrative remedies before resorting to the courts.[20] Nor is this a case in which

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[19] *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 431-433 (1935); *Florida* v. *United States*, 282 U. S. 194, 215 (1931); *Mahler* v. *Eby*, 264 U. S. 32, 43-45 (1924); *Wichita R. R.* v. *Public Utilities Commission*, 260 U. S. 48, 59 (1922), and the dissent in *United States* v. *Chicago M. St. P. & P. Ry. Co.*, 282 U. S. 311, 342-344 (1931) (Pet. Br. 20-21).

[20] *Far East Conference* v. *United States*, 342 U. S. 570 (1952); *Tank Car Corporation* v. *El Dorado Terminal Co.*, 308 U. S. 422, 432-433 (1940) and *St. Louis, Brownsville & Mexico Ry. Co.* v. *Brownsville Navigation District*, 304 U. S. 295, 301 (1938). (Pet. Br. 22).

Respondent has petitioned the Court to exercise the legislative function of rate-making.[21] Admittedly, if this case did fall into any of these categories, the lower court would clearly have erred in not remanding the case for further administrative determination.

That administrative orders can on occasion be modified by the judiciary without the necessity of remand and further agency deliberation is confirmed by the many decisions of this Court, as well as those of the lower federal courts and is conceded by Petitioner (Pet. Br. 29). For example, a cease and desist order issued by the National Labor Relations Board was limited, and enforced as limited, by this Court in *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426 (1941) (Pet. Br. 28). On another occasion this Court struck an invalid condition from an order of the Interstate Commerce Commission and enforced the order as modified, *United States* v. *Chicago, Milwaukee, St. P. & P. Ry. Co.*, 282 U. S. 311 (Pet. Br. 21, 28) and see p. 34, *infra*. In still another instance, an order of the National Labor Relations Board was enforced by the court notwithstanding the fact that the situation had materially changed since the original order was issued and that the issue to be decided was admittedly one normally heard in the first instance by the administrative board, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416 (1947). Similarly, an order of the Federal Trade Commission was substantially modified by this Court and enforced as modified in *Federal Trade Commission* v. *Beech Nut Packing Co.*, 257 U. S. 441 (1922).[22]

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[21] *Southern Ry. Co.* v. *Tift*, 206 U. S. 428, 437-438 (1907); *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 448 (1907); *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 437 (1949); and *United States* v. *Jones*, 336 U. S. 641, 652-653, 670-671, 672-673 (1949) (Pet. Br. 22).

[22] See also *Alberty* v. *F. T. C.*, 182 F. 2d 36 (D. C. Cir. 1950), cert. denied 340 U. S. 818; *Gimbel Bros. Inc.* v. *F. T. C.*, 116 F. 2d 578 (2d Cir. 1941); *Belmont Laboratories*, 103 F. 2d 538 (3d

Petitioner concedes (Pet. Br. 29) that if it is clear that the Commission would have authorized the license without the conditions, the order may stand as modified by the Court of Appeals.

The significant factor in this case is that all findings prerequisite to the issuance of a license were made by the Commission on March 3, 1948,[23] before the invalid condi-

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Cir. 1939); *Century Metalcraft* v. *F. T. C.*, 112 F. 2d 443 (7th Cir. 1942); *N. L. R. B.* v. *Walt Disney Productions*, 146 F. 2d 44 (9th Cir. 1945); *Educators Assn.* v. *F. T. C.*, 108 F. 2d 470 (2d Cir. 1940); *Folds* v. *F. T. C.*, 187 F. 2d 658 (7th Cir. 1951); *Joy Silk Mills* v. *N. L. R. B.*, 185 F. 2d 732 (D. C. Cir. 1950), cert. denied 341 U. S. 914.

[23] The order of March 3, 1948 (set forth in full in printed transcript, pp. 51-56) includes, among others, the following findings:

"(11) No conflicting application is before the Commission.

(12) Public notice has been given as required by the Federal Power Act.

(13) The project does not affect any Government dam, nor will the issuance of a license therefor as hereinafter provided affect the development of any water resources for public purposes which should be undertaken by the United States itself.

(14) The issuance of a license as hereinafter provided will not interfere or be inconsistent with the purpose of any reservation or withdrawal of public lands of the United States.

(15) Under present circumstances and conditions and upon the terms hereinafter imposed, the project is best adapted to a comprehensive plan for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes.

(16) The horsepower capacity hereinafter authorized to be installed in the project is 130,000 horsepower, and the energy generated thereby will be used for public-utility purposes.

(17) In accordance with Section 10(d) of the Act, the rate of return upon the net investment in the project and the proportion of surplus earnings to be paid into and held in amortization reserves are reasonable as hereinafter specified.

tions complained of were even proposed as regulations of the Department of the Interior (October 14, 1948, 13 Fed. Reg. 6214). By the time the Commission issued its superseding order of October 13, 1949 authorizing the inclusion of transmission lines as part of the approved project, the Commission was able to note in its order that the construction of the power plant was "practically completed so that within a relatively short time the first three units will be ready for operation." (R. 101).

The original 1948 order of the Commission authorizing the issuance of the license reserved for later determination "what transmission facilities should be included in the license as part of the project." (R. 55). After that later determination was made, the Commission's 1949 order was complete as to what transmission facilities were includible in the project without reference to the invalid conditions.

Petitioner now contends (Pet. Br. 20) that the order authorizing the license should have been remanded to the Commission in order that it could determine whether the project, independent of the invalid conditions, *continued* to be "best adapted to a comprehensive plan * * * for the improvement and utilization of water power development, and for other beneficial public uses." (Section 10(a)).

As the 1948 order of the Commission found the project as a whole to be fully consistent with the requirements of Section 10(a), the only part of the project that was not expressly found to be consistent with the requirements of Section 10(a) was "what transmission facilities were to be included in the project."[24]

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[24] The phrase "what transmission facilities" clearly connotes their location, termini, capacity, constituent materials, design and other purely physical characteristics, solely for one purpose—to insure an adequate outlet for the energy generated by the project theretofore approved. It obviously does not comprehend details of operation, relationships with competitive power producers, finan-

The Court of Appeals expressly held that the terms of Section 10 "cannot be construed to require the interconnection of private facilities with public facilities and the compulsory transmission of public power by a private company * * *. The problem which is presented to us in this case is essentially a legislative problem," 189 F. 2d 665, 670.

Having found that the conditions attached to the order were in no wise authorized by Section 10, and that the problem to which the conditions related was *legislative* rather than *administrative*, no modification of the order *could* have been authorized by the Commission pursuant to Section 10(a). That section of the statute authorizes modification of the project *only* "if necessary in order to secure the plan." But the Court had found that the problem to which the conditions related could not be given any administrative consideration whatsoever as part of such a plan. Accordingly, the deletion of the conditions could not have altered the finding of the Commission that the project was "best adapted to a comprehensive plan for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes." By the same token the deletion of the conditions could not provide a basis for modification of any of the project plans.

Petitioner argues (Pet. Br. 29) that the action of the Court would deprive the Secretary of the Interior of the opportunity of presenting to the Commission his objections to the grant of a license without such conditions. The opinion of the Court of Appeals, 189 F. 2d 665, however,

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cial adjustments between the parties, or commitments to devote a licensee's property to the use of competitors without possibility of recovery of the licensee's possession, except on 24 months' notice, irrespective of the intensity of its need.

holds that the entire question to which the conditions relate —required interconnection of private facilities with public facilities and compulsory transmission of public power by a private company—is *inappropriate for administrative action.* The problem "is essentially a *legislative* problem" and the forum for the presentation of such views is the Congress.

This is in direct contrast to the cases cited at page 23 of Petitioner's Brief in which remand was ordered in the light of what Petitioner calls "changed circumstances." In each of these cases further consideration was required to be given to matters which were concededly *administrative* in nature.[25]

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[25] In *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (1948), this Court held that two provisos contained within the FTC order were invalid and permitted that Commission to refashion such provisos which related to "the very fact questions of injury to competition, etc., which the act requires the Commission to determine as the basis for its order" (at p. 54). In *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608 (1946), and in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212 (1933), this Court ordered remand so that the Commission could give consideration to alternative remedies for eliminating an unfair trade practice which the Commission was charged with preventing. In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940), this Court held that a judicial mandamus order requiring the FCC to give prior consideration to an applicant in whose first application legal error was contained was invalid in that it would have added a priority to the statute which was not otherwise present. In *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364 (1939), proceedings were remanded "to the end that valid and essential findings may be made" (at p. 373). Remand was required in *Addison* v. *Holly Hill Co.*, 322 U. S. 607 (1944) for promulgation of a valid and necessary definition of "area of production" for it was held that to delete the invalid definition from the statutory exemption would be to "fly in the face of congressional purpose" (at p. 620).

And where this Court has determined that separable conditions are *legislative* in character, it has done exactly the same thing as the court below—affirmed the agency's order after the illegal conditions were set aside. In *United States* v. *Chicago, M., St. P. & P. R. Co.,* 282 U. S. 311 (Pet. Br. 21, 28), involving an attempt by the Interstate Commerce Commission to condition the issuance of securities, this Court said at pp. 324 and 331:

> "The power to impose such conditions, however, is not unlimited and may not be exercised arbitrarily or (since Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard . . .), unless there be found substantial warrant for the conditions in the applicable standards established by the provisions of the act . . .
>
> "The order in itself, being complete and self-sustaining and resting upon grounds found to be sufficient to support it, cannot be made to depend upon submission to a collateral condition, which, as we have shown, is beyond the statutory and constitutional power of the commission to impose . . .
>
> "From the foregoing it results that the condition in respect of the special fund of $1.50 per share was properly set aside . . .
>
> "Decree affirmed."

This case is of particular interest in relation to this proceeding for *it required an act of Congress,* in writing Section 77B of the Bankruptcy Act, to give the Interstate Commerce Commission the jurisdiction it previously sought to establish by the imposition of conditions.[26]

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[26] As Congressman LaGuardia stated in the debates in the House on the amendments to the Bankruptcy Act (76 Congressional Record, 72nd Cong., 2nd Sess., p. 5358):

> "We have taken the views in the minority opinion in the *Chi-*

The 1948 order authorizing issuance of a license was clearly separate and distinct from the invalid conditions subsequently imposed and included all findings prerequisite to authorization of a license for the project as a whole. The invalid conditions, which were imposed in 1949 when the transmission lines were included within the project, related to matters held to be outside any of the terms of the Act and of *legislative* rather than *administrative* concern. No further administrative action was either necessary or proper. It was, accordingly, appropriate for the Court of Appeals to delete the invalid conditions as surplusage separate and distinct from the order authorizing the issuance of the license, and to affirm the order without the conditions, as complete in and of itself, fully exercising the Commission's duties under the Act.

III.

No Power Has Been Conferred Under Any Act of Congress to Impose the Conditions Complained of Upon Any License Issued Under the Federal Power Act.

Petitioner's initial argument on the merits is based upon a completely false premise, which assumes that Congress has delegated to Petitioner the authority of the United States to impose conditions or restrictions upon the use of its property. We have never contended, and specifically so stated in our briefs below, that the United States, in its sovereign capacity as the owner of the public lands, cannot condition their use as it sees fit. Consequently, the cases

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cago, Milwaukee & St. Paul Railroad case, even to the extent that all incidental and indirect costs, expenses and fees are subject to the control of the Interstate Commerce Commission, and have written that into the law."

cited at page 32 of Petitioner's brief have no relevance whatsoever.[27]

In the entire discussion of the substantive issue here, Petitioner cites only two other cases. One, in a footnote at page 45 of its brief, is cited in support of the less than startling proposition that sometimes "licensees" under

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[27] *Hamilton* v. *Regents of University of California*, 293 U. S. 245 (1934), involving the alleged repugnancy of required courses in military science by a state university to *both* the State and Federal Constitutions, and *Sinclair* v. *United States*, 279 U. S. 263 (1929) involving the authority of a Congressional committee to investigate matters affecting reserve oil lands of the Navy, are too patently irrelevant to require discussion.

Of considerable interest, however, is the case of *United States* v. *The City and County of San Francisco*, 310 U. S. 16 (1940) (Pet. Br. p. 32). This case involved the Hetch-Hetchy Act of December 19, 1913 (38 Stat. 242), which is the subject of the first proviso to Section 29 of the Federal Power Act, stating:

> "*Provided*, That nothing herein contained shall be held or construed to modify or repeal any of the provisions of the Act of Congress approved December 19, 1913, granting certain rights of way to the City and County of San Francisco, in the State of California."

This indicates that the provisions of the Federal Power Act might otherwise be deemed to modify or repeal the provisions of the earlier statute, requiring, *inter alia*, that "Hetch-Hetchy power be publicly distributed" (310 U. S. at p. 30), and thus emphasizes the distinction between the limited power of the Commission to impose conditions and the very broad power exercised *by Congress* in so conditioning the Hetch-Hetchy grant.

Further, the reasoning applied by this Court in the *San Francisco* case is equally applicable here. There the City contended that its arrangement with the private utility was a contract of agency rather than a sale, and pointed to precise characterizing language in the instruments executed by it and the utility. Nevertheless, this Court said (310 U. S. 16, 28):

> "Mere words and ingenuity of * * * expression * * *, cannot by description make permissible a course of conduct forbidden by law."

Part I of the Federal Power Act are not also "public utilities" under Part II of the Act—Respondent is both a "licensee" and a "public utility". The other case, *Idaho Power Company* v. *Chapman* (D. D. C., Civil Action No. 4540-50, June 2, 1952),[28] is mentioned at pages 54-55 as upholding the validity of the conditions imposed by the Secretary of the Interior's regulations under the Act of March 4, 1911, (which are set out, *in extenso*, in the Appendix to Petitioner's brief). The statutory power of the Secretary of the Interior under that Act, of course, has nothing to do with this case.

The major part of the balance of Petitioner's argument on the merits (Pet. Br. 50-55), consists solely of an analysis of the irrelevancies of the Administration's public power program, numerous, self-serving declarations from the reports of the Department of the Interior and affiliated bodies, and recitals of a series of totally unrelated acts of Congress, which recitals have no more relevance to the issue here than a list of "begats" in the Book of Chronicles.

On the other hand, we submit that there is proof conclusive that Congress never made any such delegation of the sovereign's rights over its own property to anyone, but, in fact, spelled out most clearly its intention to withhold such power in enacting both the present statute and the original Federal Water Power Act of 1920.

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[28] The Solicitor General also casually ignores three other rather important considerations relating to this action: (1) the regulations set forth in the Appendix to his brief here are not the same as those considered in the Chapman case, but were drastically amended on July 1, 1952, subsequent to that decision, (2) such decision was grounded primarily on the determination that the Declaratory Judgment action therein was premature in light of the determination of this Court in *Eccles* v. *Peoples Bank*, 333 U. S. 426 (1948), and (3) a motion for a new trial is pending in the District Court with respect to this decision on the grounds of such subsequent changes in the Department of the Interior's regulations and the decision of this Court in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 937, 7 S. Ct. 863 (1952).

A. No such authority was conferred, either expressly or by implication, by the Federal Water Power Act of 1920.

The licensing authority conferred upon the Commission under the provisions of the 1920 statute (Act of June 10, 1920, 41 Stat. 1063, formerly 16 USC § 791), is identical, with one important exception which we shall discuss later,[29] with that contained in the present statute.[30] Nowhere in the former Act is any authority granted to *anyone* (including the Commission or the Secretaries of War, Interior or Agriculture, who were the original members of the Commission) to require that the use of the public lands be conditioned upon the transportation of government power, or that electric utilities seeking licenses thereunder should be subject to the obligations of common carriers. This is true even though the Mineral Leasing Act of 1920, adopted some five months prior to the Federal Water Power Act, required that oil and natural gas pipe lines could use right of ways through the public lands only upon the express condition that they "shall be constructed, operated and maintained as *common carriers*", 41 Stat. 449, c. 85, § 28, 30 U. S. C. § 185.[31]

By reason of the fact that the Mineral Leasing Act was adopted on February 25, 1920, it is most logical to assume that the question of imposing common carrier obligations upon electric utilities under the Federal Water Power Act was in the mind of Congress during the debates upon that statute. Research shows not only that the precise question was considered, but that the following amendment was ac-

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[29] See page 42 *infra*.

[30] The licensing provisions with which we are concerned here of the present statute, Sections 4(e), 10(e), 10(e) and 10(e) have the same subsection numbers in both statutes with the exception of 4(e) which was formerly Section 4(d) of the Federal Water Power Act.

[31] See page 45 with respect to the 1935 Amendments to the Mineral Leasing Act.

tually proposed by Representative Mays to H. R. 3184, the bill which became the Federal Water Power Act of 1920 (58 Cong. Rec., 66th Cong., 1st Sess. (1919) p. 2136):

> "That *all transmission lines* constructed or operated under authority of this act shall be constructed, operated, and maintained as *common carriers.*"

There followed the colloquy quoted below between Representative Mays and Representative Esch, the House manager of the bill (*ibid.* p. 2137):

> "Mr. Mays: Why do you make railroads common carriers and why do you make pipe lines common carriers? Mr. Esch: We have made both of those common carriers because they entered into interstate commerce. But *the theory of this bill is to allow the State* regulatory body to have *control over* the rates, the securities, and other features of *the transmission lines* and power developments within the State, and it is only where the current is interstate *and where the State commissions can not agree, or where there is no commission*, that we give *this* commission the powers that are granted to the Interstate Commerce Commission."

The Mays amendment was overwhelmingly defeated (*ibid*).

It is patent, of course, that before any utility can be required to carry the goods or products of another, or of the public generally, it must be denominated a "common carrier". This is precisely the theory on which Congress proceeded in enacting the 1935 amendments to the old act, bringing into being the current statute. The original provisions of the Wheeler-Rayburn Bills, requiring public utilities to exchange energy and transmit energy for other persons upon request, were termed the "common carrier" provisions of the proposed legislation (*Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5423*, 74th Cong., 1st Sess., (1935) p. 531 and SEN. REP. No. 621, 74th Cong., 1st Sess. (May 13, 1935), p. 19).

These provisions were entirely eliminated upon enactment of the statute as we shall see later on.[32]

It would, therefore, be difficult to find a more clear intention on the part of Congress to withhold the power to require the transmission of energy for others, including the Federal Government, and to reserve that power to the states. Here Idaho Power Company is subject to comprehensive regulation by public service commissions in the three states in which it operates, *Oregon Compiled Laws* (Ann.) Title 112; *Idaho Code* Title 61; and *Nevada Compiled Laws* 1929 (and Supps.) Section 6100 *et seq.* And there is, of course, no showing of disagreement among such commissions with respect to these lines or any other part of the system of Idaho Power Company. Further, as this Court has pointed out in *First Iowa Hydro-Elec. Coop.* v. *Federal Power Commission*, 328 U. S. 152, 171 (1946):

> "We find that when [the Federal Power] Act is read in the light of its long and colorful legislative history, it discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the nation, and a *determination to avoid unconstitutional invasion of the jurisdiction of the states. The solution reached is to apply the principle of the division of constitutional powers between the state and federal governments.* This has resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter."

Consequently Petitioner's argument that the power here claimed was delegated under the 1920 Act must fail, entirely aside from the clear revelation of Congressional intent provided by the defeat of the Mays amendment, for the reason stated by this Court in *Connecticut Light and Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 532 (1945):

> "'Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed

[32] See page 46 *infra*.

situations and then to leave the problem to traditional state control, *the existence of federal authority to act should appear affirmatively and not rest on inference alone.*' Yonkers v. United States, 320 U. S. 685, 692, 64 S. Ct. 327, 331, 88 L. Ed. 400; State of Florida v. United States, 282 U. S. 194, 211, 212, 51 S. Ct. 119, 1923, 124, 75 L. Ed. 291; cf. Palmer v. Commonwealth of Massachusetts, 308 U. S. 79, 84, 60 S. Ct. 34, 36, 84 L. Ed. 93; Federal Trade Commission v. Bunte Bros., 312 U. S. 349, 351, 61 S. Ct. 580, 581, 85 L. Ed. 881."

B. The authority here claimed was specifically withheld by Congress in enacting the Federal Power Act of 1935.

Petitioner, in substance, contends (Pet. Br. pp. 38, 44-46) that the Federal Power Act is an entirely new statute superimposed upon the old Federal Water Power Act and therefore it in no way affects the previous licensing powers of the Commission. That is not so. The purpose of the Congressional action of 1935 was to codify and greatly expand existing legislation relating to the public utility industry. Section 212 of the Public Utility Act of 1935, 49 Stat. 847 (in which was also included the Public Utility Holding Company Act of 1935), specifically provides "Section 1 to 29, inclusive, of the Federal Water Power Act, *as amended*, shall constitute Part I". Section 213 provides that "the Federal Water Power Act, as amended, is *further amended*, by adding thereto" Parts II and III.[33]

Thus it is clear that the present statute is a legislative unit as a whole and may not be divided into mandates to be separately applied as the Petitioner's particular desires at the moment dictate.

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[33] Senate Report (SEN. REP. No. 621, 74th Cong., 1st Sess., *supra*) points out at p. 18:

> "The Federal Water Power Act, as amended, *including the new parts 2 and 3*, is given the short title, the 'Federal Power Act.' This *entire* act is to be administered by the Federal Power Commission."

Turning from this general intent of Congress to weld the two acts into a unified whole, we find that the specific sections of Part I in issue here were amended by the Public Utility Act of 1935 so as completely to demolish Petitioner's contentions. Under the 1920 statute, Section 10 (which Petitioner's brief not only admits but contends is an all important section relating to this litigation), provided that "all licenses issued under this *Act* shall be under the following conditions". In the 1935 amendments the word "*Act*" was replaced by the word "*Part*". However, subdivision (g) of Section 10 reading "Such other conditions not inconsistent with the provisions of this *Act* as the Commission may require" *remains unchanged*. Similarly, the word "Part" was substituted for "Act" in the first sentence of Section 6. But the second sentence, which provides licenses shall contain "such further conditions, if any, as the Commission may prescribe in conformity with this *Act*", was not altered by the 1935 amendments. (See H. Rep. No. 1318, 74th Cong., 1st Sess. (1935), pp. 38-39).

It therefore follows inexorably, no matter what the Commission's authority to impose conditions might have been theretofore, that from and after August 26, 1935, the Commission could only impose conditions which were consistent with the present Act *as a whole*, including Parts II and III, regardless of whether the source of Congressional authority, in enacting the statutes, be the exercise of sovereign power over commerce or that of proprietorship over public lands (see Petitioner's Brief, p. 36).

Viewed in this context the virtually incredible attempts of Petitioner to distort the testimony of Mr. Dozier DeVane, at pages 40-44 of its brief, lie fully exposed. And the irretrievably damaging quality of this testimony is demonstrated, particularly where Mr. DeVane says (*Hearings before House Committee on Interstate Commerce, on H. R. 5423*, 74th Cong., 1st Sess., 1935):

> "If * * * it is the desire of Congress not to * * * give the municipal or governmental projects the right to

use the *transmission lines of private industry*—and we have not succeeded in making that clear in this bill—an amendment should be proposed that will do it better. It will receive our hearty endorsement." (p. 514).

* * * * * * * * *

It is *not* intended to give the Commission power to require the *private lines to take on any power generated* by municipal plants or *by any Government plant*. (p. 546).[34]

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[34] It should also be noted that Petitioner's contention (p. 44) that Mr. DeVane's discussion related only to this "bill", raising the implication that he was only talking about Parts II and III, ignores the further statement of Mr. DeVane at page 549 of his testimony where he refers to this "*law*":

"The only thing that we have discussed is the desirability of making it perfectly clear in *this law* that it is not the intention of *this law* to reach out and get control of that power nor is it the intention of *this law* to authorize this Commission to require the transmission of that power on the lines of these *private operating companies*" [and not specifically "public utilities" as defined by Section 201(e) in Part II of the Act.]

This is also made clear by Mr. DeVane's testimony before the Senate Committee which Petitioner does not mention in its brief, *Hearings before Senate Committee on Interstate Commerce on S. 1725*, 74th Cong., 1st Sess. (April 19, 1935):

"Mr. DeVane. The industry will probably appear before you and say that the Federal Power Commission is given power under this bill to make the private utilities take government power from these projects—that we have the authority to require physical connection and to make them purchase power. I just want to make it clear before they start on that that the *bill* itself does not give the Commission that authority, and our intention in the preparation of the *bill* was not to give the Commission that authority. If there is any doubt about it, a clarifying amendment should be put in if it is the view of the Congress that the authority should not be given. But it is not the intention of this *bill* to do that." (pp. 256-7)

* * * *

"Senator Hastings. May I inquire what is there about this Title II [which constituted that part of the Public Utility Act

In sum, the construction attempted by the Solicitor General is to accuse Mr. DeVane, and the then members of the Commission he was authorized to represent (*ibid.* 515), of perpetrating a fraud upon the Congress.

Entirely aside, however, from the interpretative aid provided by Mr. DeVane's testimony, is the far more important fact that the Senate Committee inserted an entirely new subsection[35] in the bill relating to this specific problem. The Senate Report (No. 621, 74th Cong., 1st Sess.) relating to this amendment states at p. 19:

> "Despite repeated assurances by representatives of the Federal Power Commission that no such authority was intended, the charge was frequently made that the bill as originally introduced authorized the Commission to *compel private utilities to establish connection or exchange power with public plants.* This new subsection carries out in unmistakable terms the original intention of the bill in this respect."

And again at page 49:

> "Subsection (e)[35] expressly excludes from the op-

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of 1935 which became Parts I, II and III of the Federal Water Power Act as amended] that the industry does object to?

"Mr. DEVANE. I can tell you what they tell us they object to. I think *title II*, from their standpoint, is important, and they may look upon it as serious regulation. They object very much to Section 202(a), which makes their lines common carriers. They object very seriously to any authority that would make them purchase or transport power from a public project, which is not in this *bill* but to which they devoted a great deal of their time at the House Hearings. Those, as I recall, are the two chief attacks that they made on *title II*.

"The CHAIRMAN. Let me understand you. You say that there is nothing in *the bill* which compels them to transport power of a public project over their lines. Am I correct in that?

"Mr. DEVANE. That is right, sir." (p. 260).

[35] Which became Section 201(f) upon final enactment.

eration of the act the United States, the States, municipalities, and all of their agencies. It is designed to make perfectly clear that *no compulsory powers may be exerted upon public projects or upon privately owned projects for the benefit of public plants.*"

On the other hand, at exactly the same time Congress specifically gave to the Secretary of the Interior, in amending the Mineral Leasing Act of 1920 (41 Stat. 449, 30 USC § 185), substantially the same power over natural gas and oil pipe line companies crossing the public lands that it denied to the Federal Power Commission with respect to electric utilities. The amendment to that Act, *approved five days prior* to the signature of the Public Utility Act of August 26, 1935, added the specific requirement that such pipe line companies crossing the public lands:

> "* * * shall accept, convey, transport * * * oil or natural gas *produced from government lands* in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may * * * determine to be reasonable," (Act of August 21, 1935, c. 599, § 1, 49 Stat. 687).

It is readily apparent, therefore, that the concept of using private facilities for the furtherance of governmental purposes was before the Congress when the Federal Power Act was enacted. And yet, this power was considered and withheld from the Commission.

If Congress had decided to give such power to the Petitioner, it obviously would have done so in a manner similar to the grant of authority conferred by the amendment to the Mineral Leasing Act, *supra*. As this Court pointed out in *Interstate Commerce Commission* v. *Oregon-Washington R. & Nav. Co.*, 288 U. S. 14, 35 (1933):

> "If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital * * * we may well be confident that Congress would have made its meaning far clearer and more direct *than in the present meager provisions* * * *.

Moreover, *if the purpose were that claimed* by the Commission, *support should be found in the legislative history.*"

Finally, as we have mentioned above, the whole common carrier concept, which is the essential predicate to requiring any utility company to act as a carrier for *anyone,* was an important aspect of the original drafts of the Wheeler-Rayburn bill, but was completely eliminated upon the enactment of the statute in its final form. The Senate Committee Report states (SEN. REP. No. 621, 74th Cong., 1st Sess.) at p. 19:

> "*C. Interconnection and coordination of facilities; the common carrier.*—Section 202(a) of S. 1725 imposed upon each public utility the duty to furnish energy to, exchange energy with and transmit energy for any person upon reasonable request. This provision has been eliminated, and the other subsections of the old section 202 which relate to rates have been removed to the general rate section (sec. 205). While imposition of these duties may ultimately be found to be desirable, the committee does not think that they should be included in this first exercise of Federal power over electric companies. It relies upon the provision for the voluntary coordination of electric facilities in regional districts contained in the new section 202(a) (formerly sec. 203(a)), for the first Federal effort in this direction."

Congress having already spoken on this all important subject in a detailed and carefully drafted section of the Act, it is clear that *all the authority conferred upon the Commission with respect to interconnection of facilities and transmission of power is contained in that section.* Resort can not be had to any other section of the statute to expand such authority. *The Act is the limit, as well as the grant, of the power conferred.* As this Court stated in *MacEvoy Co.* v. *United States,* 322 U. S. 102, 107 (1944):

> "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter spe-

cifically dealt with in another part of the same enactment.' "[36]

C. No other federal statute confers authority upon either the Commission or the Department of Interior to impose conditions upon licenses inconsistent with the Federal Power Act.

The compilation of statutes related to the Federal Power Act and the jurisdiction of the Commission contained in the pamphlet copy of the Act filed with the Clerk (Pet. Br. p. 3) illustrates the type of authority conferred upon the Federal Power Commission by these independent enactments. The pattern of these Acts is the same in that they modify the Commission's power to issue licenses with respect to projects in specific areas of land located within Indian reservations, national parks and monuments, in lands subject to interstate compacts, and utilize the Commission as a ready accounting and supervisory agency over the projects operated by new government agencies created by the Congress, such as the TVA and the Bonneville Power Administration.

But in none of those enactments or in those passed subsequent to the date of the pamphlet, such as the important and far-reaching Flood Control Act of 1944 (Act of December 22, 1944, 28 Stat. 887) is the scope of the Commission's licensing authority in any way extended to permit the imposition of conditions inconsistent with the provisions of the Federal Power Act. This is equally true of the limited power of the Secretary of Interior to recommend the imposition of license conditions to the Federal Power Commission. Reference is made in Petitioner's brief (p. 57) as to the authority conferred upon the Secre-

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[36] See also *Kepner* v. *United States*, 195 U. S. 100, 125 (1904) and *Townsend* v. *Little*, 109 U. S. 504, 512 (1883). Similarly, as this Court has pointed out "Specific terms prevail over the general in the same * * * statute", *Ginsburg & Sons* v. *Popkin*, 285 U. S. 204, 208 (1932); *Missouri* v. *Ross*, 299 U. S. 72, 76 (1936).

tary of the Interior by the Act of March 4, 1911, 56 Stat. 1253, 43 U. S. C. §§ 957, 959 and 961. A reading of that statute and the Department of the Interior's regulations promulgated thereunder (both set forth in the Appendix to Petitioner's Brief) make plain their total irrelevance to the issues in this case and Petitioner's improper and premature attempt to pre-try in this forum the case of *Idaho Power Company* v. *Chapman* (D. D. C., Civil Action No. 4540-50, June 2, 1952), *supra*, p. 37.

The only authority given to the Secretary of the Interior with respect to the issuance of licenses under the Federal Power Act is found in Section 4(e), which provides that licenses under the act shall:

> "contain such conditions as the Secretary of the department under whose supervision such *reservation* falls shall deem necessary for the adequate protection and utilization of such *reservation*".

As we have pointed out above, the two transmission lines here in question cross both the public lands *and* reservations of the United States. With respect to the Boise line, of its total length of 73 miles, 31.6 miles cross public lands, but only 0.2 miles are upon *reservations* of the United States. In the case of the American Falls line, having a total length of 116 miles, 93.7 miles cross public lands, but only 27.2 miles thereof are upon *reservations* of the United States. But these reservations are not statutory reservations such as national forests, parks or monuments. They are merely reclamation withdrawals (under the Reclamation Act of June 17, 1932, 32 Stat. 388), the use of which would be wholly unaffected by the mere erection of transmission lines. No part of the Bliss project lies within a statutory reservation of the United States, under the "supervision" of the Secretary.

It is therefore obvious that the Secretary has no statutory authority whatsoever even to propose the conditions complained of, as they have no relation whatever to the

"protection and utilization of such reservations" (R. 22).

What the Secretary has attempted, of course, is to seize, through the guise of conditions, the administrative control over the Commission exercised by his predecessors in office under the Federal Water Power Act prior to the 1930 amendment. This amendment, (Act of June 23, 1930, 46 Stat. 797), referred to at page 33 of Petitioner's brief, substituted an *independent* commission of five commissioners, each appointed by the President, in lieu of the original body composed of the Secretaries of War, Interior and Agriculture. (See historical note to 16 U. S. C. A. § 792).

Oddly enough the impetus for this amendment came from the three secretaries themselves. In stating some of the reasons for the desired change, the then Secretary of Interior, Ray Lyman Wilbur, made the following significant comment in hearings before the House Committee on Interstate and Foreign Commerce (*Hearings on H. R. 11408*, 71st Cong., Second Sess. (1930), pp. 48-49):

> "I agree with Secretary Hyde [Secretary of Agriculture] that we can well allow these departments to be represented at hearinigs before the Commission to present phases of departmental interest, rather than to have the control remain in the departments. Otherwise even though you set up the Commission, you will leave in the hands of the Secretaries, or in the hands of the bureau heads, the power to negate whatever the Commission may want to do, that is, to ask the consent of the department involved.
>
> I cannot conceive of this Federal Power Commission really being effective *unless it controls all power sites where it grants licenses*, for if you have to ask the permission of this department or that department, there will be difficulties that will be absolutely impossible to overcome."

Consequently, the efforts here of the Secretary of the Interior to extend the effective area of the regulations of his Department, *by influencing the actions of an independent agency*, are just as improper (and as complete a deroga-

tion of the intent of Congress in enacting the 1930 amendment) as if the present Secretary should seek to regain the control over the railroad industry held by his predecessor under the original "Act to Regulate Commerce" (Act of February 4, 1887, 24 Stat. 379), prior to the creation of the Interstate Commerce Commission as an independent agency under the Act of March 2, 1889 (25 Stat. 855, 49 USC § 11).

D. The fact that petitioner has not exercised so important a power for nearly 30 years is further proof that such authority was not conferred by Congress.

It is also of marked significance that during the entire period from the enactment of the original Federal Water Power Act in 1920 to October 4, 1949, when the Secretary of the Interior first proposed the conditions complained of to the Commission (R. 95) that it never occurred to either the Secretary of War, Interior or Agriculture, or to the Commission itself, that so important a power had been granted by the Congress. Petitioner in its original Brief on Certiorari attempted to anticipate this question by references to matters *dehors* the record which, interestingly enough, are repeated here only in the most oblique fashion (Pet. Br. 50). It was there contended (Petitioner's Brief on certiorari, p. 18) that "The construction of power plants by the United States was more or less limited until the past decade," and that "The recent development of the public power program explains the absence of conditions for wheeling in earlier licenses granted by the Commission."

As was shown in our Reply Brief on Certiorari the facts are to the contrary. The Annual Report of the Secretary of the Interior (1950), cited at page 20 of Petitioner's Brief on Certiorari, shows (pp. 49-51) that of the 3,312,267 kilowatts of installed generating capacity of the public power projects there listed 2,818,167 kilowatts, or approximately 85%, was installed in 1942 or earlier. As the tabulation indicates, the great surge in the kilowatt installation of public power projects came in the years 1935-1942. Hence

such projects were *authorized* at the time when Congress deliberately considered, and withheld from the Commission, the power herein claimed. In fact, as Petitioner's Brief on Certiorari inadvertently points out (pp. 18-19), two of the largest public power plants, Bonneville and Grand Coulee, were authorized in 1935, the exact year in which Congress added Section 201(f) to the Federal Power Act and categorically stated its intention with respect to the issue here. (See page 44, *supra*). The third major unit, Hoover or Boulder Dam, was authorized by the Act of December 21, 1928, c. 42, 45 Stat. 1057, 43 USC 617.

Petitioner throughout its brief, by the use of self-serving statements[37] from its own correspondence and published reports, points to the advantages of "wheeling *arrangements*," and the coordination of private and government facilities (Pet. Br. 50), and attempts to cast Respondent in the role of the protaganist of black reaction who seeks to deprive the Government and the public of the benefits asserted to be derived. Such arguments, of course, have absolutely no bearing upon the issue here, nor can they enlarge one whit the power and authority of either the Secretary of Interior, or the Commission, to impose conditions upon licenses issued under the Federal Power Act. *Morrill* v. *Jones*, 106 U. S., 466, 467 (1882).

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[37] Cf. Concurring Opinion of Mr. Justice Jackson in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U. S. 937, 72 S. Ct. 863, (1952) at 876:

> "While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a *judge cannot accept self-serving pretrial statements* of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself."

See also *A. [illegible] Co.* v. *Peirson*, 275 U. S. 120, 128 (1927), "A man cannot make evidence for himself by writing a letter containing the statements he wishes to prove," and *United States* ex rel *Esshaki* v. *Yackey*, 19 F. 2d 64, 65 (6 Cir. 1927) and *United States* v. *Block*, 160 F. 2d 604, 607 (9th Cir. 1947) to same effect.

We do point out, however, that Respondent has for more than 30 years engaged with the Bureau of Reclamation in "wheeling" power generated at dams of the Federal Government over its transmission lines, *on a contractual basis.* But when, through the device of conditions to a license or permit, the Federal Government places a pistol at the Company's head and, in effect, says "This is your contract, sign it," the victim cannot very well be accused of a failure to cooperate.

Patently then, the answer as to why "wheeling" provisions have never been suggested before as conditions to Federal Power Commission licenses during the 30 years of that agency's existence is not that public power, in 1949, was a new and novel concept, but more obviously a perverse application of a much older concept that "a man's reach should exceed his grasp." Thus we must apply the rule laid down by this Court in *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 347, 352 (1941):

> "But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."

And again in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 513 (1949) where this Court said:

> "Thus for over *ten years* the Commission has never claimed the right to regulate dealings in gas acreage. Failure to use such an important power for *so long a time* indicates to us that the Commission did not believe the power existed."

and held that the Natural Gas Act did not confer such authority upon the Federal Power Commission.

IV.

The Action of Petitioner Constitutes Attempted Legislation and Cannot be Sustained.

As we have demonstrated above, no authority for the conditions proposed by the Petitioners can be found in the text of the statute, its legislative history, or by implication from any general powers granted. On the contrary, the legislative history of the original Water Power Act, as well as subsequent enactment by Congress, clearly shows that no such power was intended to be conferred. It is therefore clear that there is no authority express or implied for such conditions and that, in fact, they contravene rather than carry out the purpose of the statute. They are consequently, void and of no effect because they are in violation of and prohibited by Section 1 of Article I of the Constitution. As this Court pointed out, with reference to unauthorized rule-making, in *Manhattan General Equipment Company* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936):

> "The power of an administrative officer or board to administer a federal statute to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. *A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.*"

Efforts by the Department of the Interior, for example, to legislate for itself are not something new and this Court on a number of occasions has stricken down such attempts at legislation. In *United States* v. *George*, 228 U.S. 14, 21 (1913):

> "If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what [the statute] requires, *why not other conditions, and the disposition of the public lands thus be taken from*

the legislative branch of the government and given to the discretion of the Land Department?"

Again in *United States* v. *United Verde Copper Co.*, 196 U.S. 207, 215 (1905), the court said:

> "If Rule 7 [the regulation involved] is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. *Such power is not regulation; it is legislation.* The power of legislation was certainly not intended to be conferred upon the Secretary."

And see also the cases of *Work* v. *Louisiana*, 269 U.S. 250 (1925); *Santa Fe-Pacific Rk. Co.* v. *Lane*, 244 U.S. 492 (1917); and *Miller* v. *United States*, 294 U.S. 435, 439 (1935).

V.

The Conditions and Requirements Imposed by Paragraph (F) of the Commission's Order are Abitrary and Unreasonable and Deprive Respondent of Its Property Rights Without Due Process of Law.

Initially, let us examine the effect such conditions and requirements would have on Respondent and the operation of its utility business.

(F) (1) would require Respondent, at the request of the Secretary of the Interior, to convert the two lines in question from 138,000 volts to 230,000 volts for the exclusive benefit of the government's power systems, and without regard to its effect on Respondent's own requirements and public utility operations, and in violation of Section 202(b) of the Act which provides:

> "That the Commission shall have *no authority* to compel the enlargement of generating facilities * * * ."

(F) (2) would require Respondent to permit the United States to connect any of its transmission facilities with said high-voltage lines at any point, and at as many points, as it desired, regardless of the effect thereof upon the functioning of the Company's own system, and its utilization of its own lines for its own needs and purposes, thereby endangering the operating reliability of said lines and the function and purpose for which Respondent constructed them, at a cost of approximately $3,400,000. (R. 63)

(F) (3) would give the United States the right to transmit energy over Respondent's lines to preference customers of the United States—thus forcing the Company to become a carrier for government power *to be sold in competition with the Company and using the Company's own facilities for such purpose*—"in such amounts as will not *unreasonably interfere* with the licensee's use of said lines." In addition to being forced to assume common carrier status, Petitioner must further submit to interference with its own needs, and use of its own facilities, in performing its obligations as a public utility. "Unreasonably interfere" is an obviously loose phrase susceptible of conflicting interpretations, provocative of dispute and the likelihood of litigation. Can such requirements be said to be within the scope of the Act, passed to encourage investment by utilities[38] and to protect such investment under the standards which the Act itself provides?

(F) (6) would require Respondent to transmit power for the government, even prior to and in the absence of agreement on the terms therefor, upon cost ar-

[38] See H. REP. No. 715, 65th Cong., 2nd Sess. (1918) p. 29, and *Hearings before House Committee on Public Lands on H. R. 1893*, 63d Cong., 2d Sess. (1914) p. 496.

rangements which are indefinite and uncertain, and which Respondent submits will leave this Court also in considerable interpretative doubt.

(F) (8) would prevent Respondent from withdrawing capacity as needed by its customers, except upon an excessive and unreasonable notice period of two years, thus rendering Respondent's investment useless for the service of its own customers during such period. What are Respondent's customers to do in the meantime? Is Respondent to be required to construct additional lines, otherwise unnecessary, in order to perform its duties as a public utility imposed upon it by law, including the very Act which is administered by the Commission?

(F) (9) would work a clear violation of Section 6 of the Act, providing for licenses having a fixed term, and specifically setting forth the sole conditions for the revocation, alteration and cancellation thereof. Section 6 specifically provides that "Licenses may be revoked *only for the reasons and in the manner prescribed under the provisions of this Act*, and may be altered or surrendered *only upon mutual agreement between the licensee and the Commission.*" Paragraph (F) (9), however, offers only a licênse which is not a license, being subject to alteration or partial revocation upon the happening of some future event, or unknown conditions subsequent, and requiring Respondent to agree in advance to partial surrender of its license rights. This is not only a violation of Respondent's rights under Section 6 of the Act (see *United States* v. *Colorado Power Co.*, 240 F. 217 (D. Colo. 1916) and *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610 (1930), on an *ex post facto* basis, but an attempted abdication by the Commission of its licensing powers and its jurisdiction over licensed project property under the Act. Once

property becomes subject to license as a part of a "project," the intent of the Act is clear that it shall remain so, and not later be removed from under the license and the jurisdiction of the Commission, to be turned over to the jurisdiction of some other agency, and the license rights of Petitioner thus abrogated.

As we have pointed out above *all of the conditions contained in Paragraph (F) were conceived and proposed by the Secretary of the Interior and not by the Commission.* The authority to include such conditions in transmission line licenses under the Act derives solely from Section 4(e), which contains its own limitation that such conditions must be "necessary for the adequate protection and utilization" of the reservations of the United States involved.

Careful analysis of the Act reveals no other provisions which could be construed in any way as authorizing the inclusion of such conditions with respect to a license of the type here in question. Nor can this be attributed to any oversight on the part of Congress because the statute is replete with references as to the specific authority of the Commission and the various Executive Departments in particular situations.

For example, Section 10(e) provides that when licenses are issued involving the *use* of dams or other structures *owned by the United States* in reclamation projects, they shall be "subject to the approval of the Secretary of the Interior." Section 18 provides that the Commission shall require the construction by a licensee at its own expense of "such lights and signals as may be directed by the Secretary of War and such fishways as may be prescribed by the Secretary of Commerce." Section 24 provides that the Secretary of the Interior shall declare lands reserved for power sites open to location and entry following appropriate action by the Federal Power Commission.

Section 15(e), above, is of particular interest as the approval of the Secretary of the Interior is limited specifically to situations "involving the *use* of government dams or other structures *owned* by the United States." No *such structures are involved or to be used in connection with any part of the Bliss Project, or any of its facilities, under license here.*

Even a casual reading of the conditions set out in Paragraph (F) shows very clearly they have nothing to do with the "protection" or "utilization" of the reservations (i.e., reclamation withdrawals) here involved. On the other hand, it is patent that the real purpose for which such conditions were designed and requested by the Secretary is the implementation of the public power policies of the Department of the Interior. Such conditions relate solely to the conversion of the Petitioner's 138 kv transmission lines to a voltage of 230 kv; "upon the request of the Secretary of the Interior"; the coerced assent of the Respondent to the interconnection of such lines with transmission facilities of the United States; the conveyance of public power over such lines, to the exclusion of the owner's use of the full capacity thereof, and in direct competition with the sale by Respondent of energy generated in its own plants.

If any doubt could possibly exist as to the purpose of such conditions, it is completely dispelled by the words of the Secretary of the Interior in his report to the Commission of August 10, 1949 (R. 69) that:

> "The Department has, for some time, been vitally interested in and concerned with the supply of power in the southern part of the State of Idaho. The Federal Government has hydroelectric projects in the area, and other Federal projects are either under construction or have been authorized to be constructed. Prior to the time when the Idaho Power Company applied for a pre-construction permit to erect the transmission line over the public lands, the Bureau of Reclamation and the Bonneville Power Administration made and submitted a joint report * * *. *In this report the two*

agencies of the Department proposed that the United States construct, own, and operate a transmission line which would connect the eastern and western parts of the southern Idaho region. . . ."

In contrast to the conditions in Paragraph (F), as proposed by the Secretary, the Commission's Order, particularly Paragraphs (B) (4), (5), (9) and (10) (R. 104-106), contains a number of customary and appropriate "conservation" conditions. No argument is raised with respect to these latter conditions as they are reasonably related to the use of the federal lands involved and are in conformity with the purposes of the Act.

In numerous cases this Court has set aside unreasonable agency requirements which have not kept within the bounds of legislative delegation, or which were arbitrary and not reasonably directed to the accomplishment of the purposes of the statute under which they were made. As Mr. Justice Brandeis stated in *International Railway Co.* v. *Davidson*, 257 U. S. 506, 514 (1922), "A regulation to be valid must be reasonable and must be consistent with law." See also *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 135 (1936) and *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610 (1930).

The essential practical effect of Paragraph (F) of the Order here under review is to force Respondent to become a common carrier of electricity without its consent. The fact that it acts in that capacity for only one person, the Federal Government, is of no importance because one such relationship takes it out of the category of a person transporting only its own property, and the absence of a contractual basis obviously removes it from the class of contract carriers.

This was substantially the situation in the case of *Frost Trucking Co.* v. *Railroad Commission of California*, 271 U. S. 583 (1926). There the California Supreme Court construed a state statute as requiring private contract motor carriers to obtain a certificate of convenience and

necessity as a common carrier, as a condition precedent to the use of the state highways. It was contended that, as applied to private carriers, "the Act has the effect of transforming them into public carriers by legislative fiat." The same result would be accomplished here by "administrative fiat", without legislative authorization of any sort. The opinion of the Court stated at pp. 592-594:

> "That, consistently with the due process clause of the Fourteenth Amendment, *a private carrier cannot be converted against his will into a common carrier by mere legislative command,* is a rule not open to doubt and is not brought into question here. * * * The naked question which we have to determine, therefore, is whether the state may bring about the same result *by imposing the unconstitutional requirement as a condition* precedent to the enjoyment of a privilege. * * *.
>
> * * *
>
> "If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. * * * *In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,*—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden. * * *
>
> "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Paragraph (F), here complained of, "is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe," *Morrill* v. *Jones*, 106 U. S. 466, 467 (1883), and as in the

case of *United States* v. *Colorado Power Co.*, 240 Fed. 217, 221, *supra*, p. 56, relating to the authority of the Secretary of the Interior under an earlier statute, "*Congress did not* manifest any intent to *give the Secretary* the right and power to acquire for complainant *an interest*, directly or indirectly, *in defendant's plant or business*, * * * "

VI.

The Conditions Complained of Constitute a Seizure of Respondent's Property Without the Authorization of Congress.

The illegal action of the Petitioner complained of here, while differing in form (and much less dramatic and nation-wide in scope), is substantially the same in principle as the action of the Executive recently before this Court in *Youngstown Sheet & Tube Company* v. *Sawyer*, 343 U. S. 937, 72 S. Ct. 863 (1952). Analysis of the conditions sought to be imposed plainly shows they are tantamount to the seizure of Respondent's property when the Department of the Interior thereunder takes over the "unused capacity" of the line or directs that its capacity be increased to achieve the same result. Comparison of these conditions with the emergency authority conferred upon the Executive by the various acts of Congress shown in Appendix I to the Concurring Opinion of Mr. Justice Frankfurter in the *Youngstown* case (72 S. Ct. at p. 900) reveals a remarkable similarity. And as that Opinion points out (*ibid.*, p. 891) "In every case [Congress] has qualified this grant of power with limitations and safeguards" and "that Congress deemed seizure so drastic a power as to require that it be carefully circumscribed * * * "

Here, unlike the limitations and safeguards shown in Appendix I to the Opinion, carefully limiting the power given for a short period or "for a defined emergency," the Secretary's power has no limitation in time, nor is it related to

any "standard" other than his own judgment. In fact, as Item 9 of such appendix shows (p. 904), substantially the same power the Department of the Interior seeks to exercise here was given to the President by Congress in Section 16 of the old Federal Water Power Act of 1920, to be exercised upon an executive determination that "the safety of the United States demands," and the seizure is "for the purpose of manufacturing nitrates, explosives or munitions of war, or for any other purpose involving the safety of the United States".[39] Understandably enough, Petitioner has never mentioned this Section of the Act in any of its briefs, as the conditions precedent recited therein could never be met under the facts of this case. Inasmuch as the Congress has prescribed certain procedures for the executive department to follow in seizing such lines, it must follow these directives and it cannot now choose to adopt other methods. See opinion of Mr. Justice Clark in the *Youngstown* case, 72 S. Ct. at 882.

Much ado has often been made (Petitioner's brief, pp. 3, 9, 10) of the argument that Petitioner's use, or seizure, of the Respondent's transmission lines will be "with full compensation to the Licensee." The provisions of paragraph (F) of the Commission's order do provide for payment to the Respondent (R. 107-108). However, the Department of the Interior clearly "has no power to raise revenues", 72 S. Ct. at p. 887, and no showing has been made that any monies have been, or will be, appropriated to compensate the licensee for such taking and use of its transmission line properties. On the contrary, the Department of the Interior recently has been seriously taken to task by a Congressional Committee on the precise question of its unauthorized expenditures in connection with the public power program (Hearings on the "Interior Department Appropriations for 1952," Before the Subcommittee of the House

[39] The text of this Section is set forth in full in the Appendix hereto.

Committee on Appropriations, 82d Cong., 1st Sess., Part 1, (1951) pp. 498-543).[40]

In view of these circumstances, the "compensation" to Respondent, blandly assured by Petitioner's Brief, might be something less than "full". Entirely aside from this question of the equities to Respondent, Petitioner's emphasis on the payment of "full compensation" may result in his having argued himself out of court because, as the Concurring Opinion of Mr. Justice Douglas in the *Youngstown* case states (72 S. Ct. at p. 887-8):

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[40] During such hearings the following colloquy took place between Representative Jackson of Washington and Assistant Secretary of the Interior Warne (pp. 513-514):

"Mr. JACKSON. Let us take a look at what you presented to us. I have before me the justifications, the schedule of the program for the fiscal year 1951. I looked all through it and I finally came across an item referred to as the Shasta boundary terminal facilities. Do you think that is descriptive of your intention to interconnect the Bonneville Power Administration and the Central Valley system?

* * * * * * *

Mr. JACKSON. * * * I think that is the basis of your difficulty here. *The conduct of the Bureau of Reclamation subsequent to the denial of funds by this committee* is an important reason why the people of the Pacific Northwest have grave misapprehensions about the Bureau of Reclamation.

In spite of the directive by the Congress not to spend money for designs and plans the Commissioner of Reclamation last fall in California announced it was going ahead with designs and plans to interconnect the two systems. * * *

What authority does Mr. Boke have for making that announcement?

Mr. WARNE. There has not been authority to make the statement that up to this time we are proceeding with the central California-Bonneville intertie, because we do not have the authority to do that.

Mr. JACKSON. *Why does the Bureau persist in defying a directive of the Congress?*"

See also pp. 520-521 of these Hearings.

> "The branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President [or the Executive Branch] had effected. * * * If we sanctioned the present exercise of power * * *, we would be expanding Article II of the Constitution and rewriting it to suit political conveniences of the present emergency."

Here no emergency has or could be asserted. The imposition of these conditions has no relation to the present war effort, nor, of course, could the Secretary of Interior, or the Commission, claim to exert any of the prerogatives of the Commander in Chief of the Armed Forces. This is a far weaker case than that of the President in taking executive action, without Congressional authorization, to meet an evident national emergency. All of Petitioner's arguments emphasize that here also, in the language of Mr. Justice Jackson's Concurring Opinion, 72 S. Ct. p. 869, "The tendency is strong to emphasize transient relations upon policies—such as wages or stabilization policy [or the Administration's public power program]—and lose sight of enduring consequences upon the balanced power structure of our Republic."

In consequence no more reasonable determination or one more in concert with the decisions of this Court could be found than the direction of the court below, 189 F. 2d at p. 670:

> "The problem which is presented to us in this case is essentially a legislative problem. * * * If the Commission believes it to be in the public interest to prescribe such a condition upon power project licensees, it should present its views to the Congress."

CONCLUSION

If the Court determines it has jurisdiction to review this case, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Federal Power Act

SEC. 16. That when in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license hereunder, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project, or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party or parties entitled thereto; and in the event that the United States shall exercise such right it shall pay to the party or parties entitled thereto just and fair compensation for the use of said property as may be fixed by the Commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of the taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the licensee.